

Senate Defeats Murkowski Resolution to Block EPA Regulation of GHG Emissions Under Existing Clean Air Act Programs

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OVERVIEW


Yesterday, the Senate voted 53 to 47 to defeat a procedural motion that would have allowed consideration of a resolution of disapproval of the Environmental Protection Agency's (EPA) December 7, 2009 finding under the Clean Air Act (CAA) that greenhouse gas (GHG) emissions from motor vehicles contribute to an endangerment to public health and welfare ("Endangerment Finding"). The resolution, which was introduced by Sen. Lisa Murkowski (R-AK) and co-sponsored by 37 Republicans and 3 Democrats, required 51 votes to pass the Senate. Of the 47 votes, 41 were Republicans and 6 were Democrats. Even if the resolution had passed the Senate, the chances for passage in the House and signature by President Obama were generally seen as extremely unlikely. Indeed, the Administration issued an official statement this week opposing the resolution and threatening a veto.

Had the resolution been passed and signed into law, it would have removed the legal predicate for EPA's efforts to regulate GHG emissions under the CAA. The defeat of the resolution means that EPA can continue on its path to implement GHG regulations for both mobile and stationary sources. Other initiatives to limit or defer EPA's authority to regulate GHGs under the CAA remain pending before the Congress. In particular, Democratic leaders in the Senate reportedly have promised a vote on a bill introduced by Sen. Rockefeller (D-WV), which would delay for two years EPA's regulation of GHG emissions from stationary sources (S. 3072). Several moderate Democratic Senators cited a potential vote on the Rockefeller bill as a rationale for opposing the Murkowski resolution. EPA's GHG regulatory initiatives may also be overtaken by either Congressional action this year to enact a comprehensive climate change or clean energy bill or by challenges to the Endangerment Finding and EPA's regulatory initiatives that are pending before appellate courts.

EPA'S GHG REGULATORY INITIATIVES

As we have discussed in previous Issue Alerts, EPA has responded to the Supreme Court's landmark opinion in *Massachusetts v. EPA* (2007) by taking a series of actions that have laid the groundwork for regulation of GHG emissions across the economy under the agency's existing CAA authorities. (For more information about *Massachusetts v. EPA*, see April 2, 2007 Issue Alert at: <http://www.vnf.com/news-alerts-37.html>). Significant EPA GHG actions include:

- *Greenhouse Gas Reporting Rule* (September 2009). Prompted by a directive in the 2008 Consolidated Appropriations Act, EPA issued a comprehensive rule (the Reporting Rule) to require



annual reporting of GHG emissions from major GHG emitting facilities and suppliers of fossil fuels and commercial GHGs. The Reporting Rule covers approximately 13,000 facilities across 30 different source types or economic sectors, representing approximately 85% of U.S. GHG emissions. Most facilities subject to the Reporting Rule began implementing emissions monitoring on January 1, 2010, with the first emission reports due to EPA by March 31, 2011. EPA has not yet finalized reporting rules affecting the petroleum and natural gas sector. (For more information, see October 9, 2009 Issue Alert at: <http://www.vnf.com/news-alerts-393.html>.)

- *Endangerment Finding (December 2009)*. The “endangerment finding” reviewed scientific evidence on GHG emissions and climate change, and concluded that: (a) GHGs endanger public health and welfare by leading to climate change; and (b) GHG emissions from motor vehicles contribute to this endangerment. (For more information, see December 9, 2009 Issue Alert at: <http://www.vnf.com/news-alerts-418.html>.)
- *New Vehicle GHG / Fuel Economy Standards (April 2010)*. As a result of the endangerment finding, EPA was obligated to issue vehicle GHG emission standards under Section 202 of the CAA. In September 2009, the agency proposed such standards for model years 2012 through 2016 in coordination with new fuel economy standards proposed by the National Highway Traffic Safety Administration (NHTSA). The joint standards were finalized in April 2010 and will become enforceable on January 2, 2011. (For more information, see April 6, 2010 Issue Alert at: <http://www.vnf.com/news-alerts-452.html>.)
- *Reconsideration of “Johnson Memorandum” (March 2010)*. The promulgation of EPA’s vehicle GHG standards had important consequences for the regulation of stationary sources under the Prevention of Significant Deterioration (PSD) preconstruction permitting program and Title V of the CAA because these programs apply to any pollutant that is “subject to regulation” under the CAA. In its Reconsideration of the “Johnson Memorandum,” EPA determined that GHGs would become “subject to regulation” for purposes of PSD and Title V as soon as the vehicle GHG standards become legally enforceable on January 2, 2011. (For more information, see April 6, 2010 Issue Alert at: <http://www.vnf.com/news-alerts-452.html>.)
- *PSD / Title V Tailoring Rule (May 2010)*. Because PSD permitting applies to stationary sources that emit regulated pollutants in quantities at 250 tons per year generally and in some instances as low as 100 tons per year, and because a similar threshold applies to Title V operating permits under the CAA, EPA proposed a “tailoring rule” in September 2009. EPA reasoned that the tailoring rule was needed to ensure that the number of sources subject to PSD and Title V is kept at an administratively manageable level. The final rule, promulgated in May 2010, established a three-stage “phase in” of PSD and Title V requirements for GHGs, beginning on January 2, 2011. (For more information, see May 14, 2010 Issue Alert at: <http://www.vnf.com/news-alerts-463.html>.)



- Step 1 (January 2, 2011 to June 30, 2011). During this period, the PSD permitting requirements will apply only to new and modified sources that: (1) are already required to obtain PSD permits on account of emissions of pollutants other than GHGs (“anyway PSD sources”); and (2) would generate increases in GHG emissions of 75,000 tons of carbon dioxide-equivalent (CO₂e) per year or more. Sources already required to have Title V permits for non-GHG pollutants (“anyway Title V sources”) will be required to address GHGs as part of their Title V permitting process, regardless of their CO₂e emissions.
- Step 2 (July 1, 2011 to June 30, 2013). In this step, the PSD permitting requirements will apply to sources covered by Step 1, and: (1) new sources emitting at least 100,000 tons CO₂e per year threshold per year, and (2) existing sources that undertake modifications that increase emissions by at least 75,000 tons CO₂e per year. Title V permits will be required for facilities emitting over 100,000 tons CO₂e per year if they do not already have one.
- Step 3. In the third step, EPA will undertake additional rulemakings starting in 2011 to determine whether and how to phase in the PSD and Title V permitting requirements for sources below the 75,000 and 100,000 tpy thresholds. EPA will issue another rulemaking before July 2012 to deal with smaller sources; however, EPA has committed not to apply the permitting requirements to sources with emissions below 50,000 tpy prior to April 2016. In addition, EPA will consider in the course of these rulemakings various approaches for streamlining permitting.

EPA has yet to provide guidance on how PSD permitting requirements – particularly the requirement that sources install “best available control technology” (BACT) for regulated pollutants – will be applied to GHGs. The agency’s Clean Air Act Advisory Committee has been formulating technical and policy advice on PSD and GHGs that is expected to be incorporated into formal agency guidance later this year.

In addition to the above programs, EPA could still act to regulate GHG emissions under other CAA authorities. For example, EPA could choose to issue New Source Performance Standards (NSPS) setting GHG emission standards for categories of new and modified stationary sources under Section 111 of the CAA – an action that could also trigger GHG standards for existing sources. A question looming over these initiatives is whether EPA will attempt to integrate flexible approaches, such as market-based mechanisms, in order to reduce their cost impacts.

IMPACT OF REGULATIONS

The actions above will usher in a new array of compliance challenges for companies in many economic sectors, including the energy and manufacturing sectors. Companies that are potentially subject to EPA regulation will need to resolve issues such as:

- the nature and magnitude of GHG emissions from their facilities;



- whether their existing facilities exceed applicable emission thresholds for GHG reporting and Title V operating permits;
- whether new and modified facilities trigger PSD and Title V permitting obligations;
- how they will comply with BACT requirements as well as other obligations related to CAA permitting for GHG emissions; and
- whether they will be allowed to utilize market-based means for compliance.

As EPA and state and tribal permitting authorities proceed to implement CAA permitting requirements for GHGs, additional opportunities may arise for regulated industries to comment on issues such as the interpretation of BACT, permitting fees, and other critical issues. These new requirements are likely to have a significant impact on strategic business decisions, capital investment plans, and design of new or modified facilities.

POLITICAL OUTLOOK

Although the defeat of the Murkowski resolution has left EPA's authority intact for the immediate future, EPA's unfolding GHG regulatory initiatives are likely to continue to be a point of political controversy within Congress and a source of litigation.

Congressional efforts to preclude or limit EPA's regulation of GHG emissions are expected to continue, including possible consideration of the Rockefeller "time-out" bill. Such measures could be incorporated into a climate change or clean energy bill that might be taken up in the Senate this summer. Both the Waxman-Markey climate change bill passed by the House in June 2009 (H.R. 2454) and the Kerry-Lieberman bill revealed last month would curtail, albeit with some important exceptions, EPA's authority to regulate GHGs under existing CAA programs.

IN THE MEANTIME.....

Companies will be confronted with increasing regulatory obligations if they are engaged in the combustion of fossil fuels and the emission of GHGs, particularly CO₂, or are engaged in the production, transportation or handling of hydrocarbons. These regulations are being developed at a steady pace by EPA under its Clean Air Act authorities. Van Ness Feldman would welcome the opportunity to counsel you regarding these emerging regulatory responsibilities.

FOR ADDITIONAL INFORMATION

Van Ness Feldman closely monitors congressional and executive branch developments on climate change and energy policy, and is in a strong position to provide expert analysis and advice on emerging legislation and regulatory activity, the surrounding policy and political debate, and the implications for your organization. If



you would like more information about climate change and energy being considered in Congress or related regulations being considered by federal agencies, please contact Kyle Danish, Lisa Epifani, Stephen Fotis, Curt Moffatt, Tom Roberts, or any member of the firm's Climate Change practice at (202) 298-1800. Those interested in on-going coverage of climate change policy developments may wish to subscribe to the weekly Climate Change Policy Update at <http://www.vnf.com/news-signup.html>.

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